had, in fact, been carried out. In fact, it has not been carried out and that is the reason for this case.

The plaintiff, subsequent to the agreement, was permitted to collect the rent from the tenant of the premises and did so until the 1st December, 1950 when, as a result of a letter, the tenant of the shop house paid rent to the trustees of the temple which he had previously done before the date of the agreement.

Mr. Joaquim on behalf of the plaintiff has argued that the beneficial ownership of the shop house has passed to the plaintiff and that the purchaser of trust property cannot be divested of ownership because the transfer was in breach of trust. He has also argued that it is open to the trustees to apply to the Court for relief for the consequences of the breach of trust which they have not done. In my opinion, that might apply if the transfer had been completed innocently and the trustees were sued for breach of trust, but in this case the transfer was never completed, and it appears to me that it is necessary to consider whether the agreement was, as submitted by Mr. Rawson, null and void *ab initio*.

By section 20(e) of the Specific Relief (Malay States) Ordinance, 1950, a contract made by trustees either in excess of their powers or in breach of their trust cannot be specifically enforced. By section 2(g) of the Contracts (Malay States) Ordinance, 1950, an agreement not enforceable by law is said to be void, but under section 66 of the same Ordinance when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. Clearly, if the agreement cannot be enforced, the defendants must repay to the plaintiff the amount which the surviving trustees received from him. Whether or no this amount should be revalued in accordance with the schedule to the Debtor and Creditor (Occupation Period) Ordinance, 1948, is a matter which I have not got to decide in this case.

The plaintiff in his amended statement of plaint claims in the alternative for an indemnity against the defendants personally and for a declaration that the plaintiff is entitled to an indemnity for loss or damage sustained by him by reason of the failure of the contract. If the contract is null and void *ab initio*, as in my opinion it was, I cannot see how the plaintiff can succeed on his alternative claim.

The defendants by way of counterclaim ask for a declaration that the plaintiff is accountable to the defendants for the rents and profits of the said shop house for the period from 5th January, 1945 to the 1st December, 1950, subject to any amount payable by the the defendants to the plaintiff under section 66 of the Contracts Ordinance. In my opinion, they are entitled to such a declaration and to an account of such rents and profits.

The plaintiff's claim is dismissed with costs and the counterclaim of the defendants must be allowed with costs. If the parties are unable to agree as to the amount of the rents and profits received by the plaintiff, the Senior Assistant Registrar must hold an enquiry and determine the amount.

Order accordingly.

Solicitors for the plaintiff: *Rajendra & Teik Ee.*
Solicitors for the defendants: *Shearn, Delamore & Co.*

HAJI AHMAD v. SADAH (f).

[O. C. J. (Spenser Wilkinson, J.) March 5, 1954]

[Penang — Civil Suit No. 260 of 1952]

Malicious prosecution — Damages necessary to support action for — Maintenance proceedings — Whether criminal or civil.

In order to support an action for malicious proceedings it is necessary to prove damage and that there are three sorts of damage, any one of which is sufficient to support the action. The first is damage to a man's fame; the second is damage to his person; and the third is damage to his property; and the action is maintainable if, and only if, it falls within one or the other of these three heads.

It is common ground that maintenance proceedings under the Married Women and Children (Maintenance) Ordinance, 1950 (F.M.), although criminal in form are civil proceedings in substance.

Cases referred to:—

(1) *Wiffen v. Bailey & Remford Urban Council* (1915) 1 K.B. 600 at 606.

(2) *Savile v. Roberts* 1 Ld. Raym. 347.

ACTION FOR DAMAGES.

Jag-Jit Singh for the plaintiff.

Eusoffe Abdoolcader for the defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — This was an action for malicious prosecution based upon maintenance proceedings instituted by the defendant against the plaintiff in the Magistrate's Court at Balik Pulau. Those proceedings terminated in favour of the present plaintiff. Counsel for the defendant at the outset submitted in effect that the Statement of Claim

disclosed no cause of action because maintenance proceedings being civil in their nature, although criminal in form, cannot form a foundation of an action for malicious prosecution. I did not allow this point to be argued as a preliminary point because I thought it expedient to hear the evidence first. Mr. Abdoolcader for the defendant, therefore, repeated his submission after the evidence had been heard.

It was common ground that maintenance proceedings although criminal in form are civil proceedings in substance. It has been laid down that in order to support an action for malicious proceedings it is necessary to prove damage and that there are three sorts of damage, any one of which is sufficient to support the action. The first is damage to a man's fame; the second is damage to his person; and the third is damage to his property; and the action is maintainable if, and only if, it falls within one or other of those three heads (per Buckley L.J. in *Wiffen v. Bailey and Remford Urban Council*[1] citing the judgment of Lord Holt, C.J. in *Savile v. Roberts*[2]).

As to the second sort of damage, there can be no question in maintenance proceedings of damage to the person.

As to the first head, I was inclined to think at first that there might be some question in this country of damage to a man's fame because maintenance proceedings take place on the criminal side of the Magistrate's Court and are, therefore, in form criminal. The decision, however, in *Wiffen v. Bailey and Remford Urban Council*[1], I think, disposes of this suggestion. In his judgment at page 608 Buckley, L.J. says :-

> "There are many proceedings, such as proceedings for obstructing a highway, or for keeping pigs in an improper place, which are in the sense I have above indicated criminal. But no one would say that a person's fair fame was affected because he was summoned for keeping a pig in an improper place, or for allowing a dog to wander about unmuzzled contrary to a muzzling order."

I think it is clear not only from this passage but from the decision in the case itself, which was one in which the proceedings were nuisance proceedings under the Public Health Acts, that the mere fact that the proceedings are criminal in form is not sufficient to bring the proceedings within this second branch of damage.

With regard to the question of damage to property, it has been held in England that both in ordinary civil proceedings and in proceedings before justices which are merely criminal in form a plaintiff cannot claim as damages in an action for malicious prosecution the costs incurred in defending the proceedings because the Courts which hear those proceedings will have compensated him in costs as far as may properly be done according to law. I think there may well be a distinction in this country by reason of the fact that under the Criminal Procedure Code Magistrates have no general power for awarding costs to a successful accused, their power to award costs being confined to cases in which they are satisfied that the prosecution has been vexatious and without reasonable and probable cause (see section 456 of the Criminal Procedure Code). Moreover, it is doubtful whether in a maintenance case the Magistrate has power to award costs at all because section 456 applies only when the accused is acquitted, and in a maintenance case there can be no question of either conviction or acquittal. It may be, therefore, that the costs of defending maintenance proceedings in a Magistrate's Court are damages sufficient to support an action for malicious proceedings.

I do not think that it is necessary for me to decide this somewhat difficult point because, even assuming that an action will lie for malicious proceedings in respect of maintenance proceedings, I am of opinion that the plaintiff in this case did not discharge the burden of proof which lay upon him to prove both absence of reasonable and probable cause and malice.

That the defendant was to some extent actuated by malice in the non-technical sense of that term in commencing these maintenance proceedings against her husband I have no doubt; but I am by no means satisfied that this was her only motive. The evidence given on behalf of the plaintiff to the effect that the plaintiff through the elders had requested the defendant to come and live in his house or, if that should prove difficult, then in his shop and that the defendant had refused would no doubt indicate a weakness in her case for a maintenance order because sub-section (2) of section 5 of the Married Women and Children (Maintenance) Ordinance, 1950 provides that a wife shall not be entitled to maintenance if without any sufficient reason she refuses to live with her husband. But the fact that the Magistrate held that her reasons for such refusal were insufficient does not show that the defendant had no reasons for refusing to live in her husband's house. I think it is clear from the evidence before me as a whole that the defendant had at least some reasons for refusing the plaintiff's offer and that these reasons, although in the event they failed to satisfy the Magistrate, were sufficient to render it possible that a maintenance order might be made.

The evidence given on behalf of the plaintiff that the defendant sent a message through plaintiff's

Witnesses 5 and 6 to her husband to the effect that if he did not divorce her she would give him as much trouble as possible is certainly some evidence of maliciousness and also I think of malice in the sense of improper motive; but it is not in my opinion evidence of absence of reasonable and probable cause.

The undisputed facts that for some time the husband had been paying his wife maintenance whilst she was in her own house; that she had throughout her married life with her present husband lived in her own house; and that her husband had ceased to provide her with any maintenance — these facts appear to me to negative absence of reasonable and probable cause, because in these circumstances a wife might reasonably suppose that she would be entitled to an order for maintenance.

Although the defendant was an entirely unreliable witness and I would not accept her evidence upon any point in respect of which there was evidence the other way I was satisfied on the evidence as a whole that, however mixed her motives in commencing the proceedings, she did genuinely and upon not unreasonable grounds believe herself entitled to an order for maintenance.

In my opinion, therefore, the plaintiff has not made out his case and there must, therefore, be judgment for the defendant.

Judgment for the defendant.

Solicitor for the plaintiff: *Jag-Jit Singh.*

Solicitor for the defendant: *Ong Huck Lim.*

LEE BOON GAN (f) v. REGINA.

[A. Cr. J. (Spenser Wilkinson, J.) March 16, 1954]

[Penang — Criminal Appeal No. 2 of 1954]

Gaming — Common Gaming Houses Ordinance, 1953, s. 11 — Presumption under — Physical possession — Whether sufficient evidence to base inference of knowledge that accused knew general nature of thing alleged to be in her possession — Affidavits in Criminal Appeals — Statement from the dock — Value of.

The appellant was convicted on the ground that she was found in possession of gaming slips. The slips were satisfactorily proved to have been memoranda of stakes relating to three types of lottery. She appealed on the ground that the presumption under section 11 of the Common Gaming Houses Ordinance, 1953, can only arise after possession has been proved.

Section 11 reads as follows: "Any person . . . found in possession of . . . any account, memorandum, etc. relating to a lottery shall be presumed until the contrary is proved to be assisting in a public lottery then in progress."

Possession, however, as defined in **Toh Ah Loh** v. **Rex**(1), is as follows: "Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed; must have in him a power of disposal over the thing; and lastly must be conscious of his possession of the thing."

Also in the case of **Chiah Tian** v. **Rex**(2) it is defined as follows: "A person is not guilty of the offence of possession if he is not aware of the possession. There must be some evidence from which it can reasonably be inferred that the accused knew the general nature of the thing alleged to be in his possession . . . ."

The only evidence that could be inferred was that the accused attempted to avoid apprehension.

Held: the word "attempted" used by the prosecution witness is mere prejudice and the evidence amounts to more than that the appellant started to go towards the front portion and came back as soon as she was called. This does not seem to be sufficient upon which to base an inference of knowledge of what had been thrust into her hands. As the basis of the decision of the learned Magistrate was the presumption under section 11 and possession was not proved the appeal must be allowed and conviction quashed.

An affidavit was filed explaining that at the end of the prosecution case the three courses open to the appellant (who was not represented by counsel) were not properly explained to the appellant by the interpreter.

Held: there is no provision of the Criminal Procedure Code which permits affidavits to be filed in a criminal appeal or upon a criminal revision unless so ordered by the High Court. There are circumstances in which certain applications can be made in appeals by motion in which case it would be proper to file affidavits in support of the motion, but affidavits are not receivable as part of the proceedings in an appeal except in support of a specific motion.

Another ground of appeal was that the learned Magistrate appeared to have assumed that a statement from the dock was not sufficient proof for the purposes of rebutting the presumption arising under section 11 of the Common Gaming Houses Ordinance, 1950.

Held: the weight to be attached to a statement from the dock is essentially a matter for the trial Magistrate.

Cases referred to:—

(1) *Toh Ah Loh and Mak Thim v. Rex* (1949) M.L.J. 54.

(2) *Chiah Tian v. Rex* (1937) M.L.J. 105 at 106.

(3) *Rex v. Kwek Kim Chuan* (1910), Braddell C.G.H. 2nd Ed. at p. 169.

CRIMINAL APPEAL.

Lim Kheng Kooi for the appellant.

J. D. Peterkin (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — The appellant was charged jointly with another accused with assisting in carrying on a public lottery under section 4(1)(c) of the Common Gaming Houses Ordinance, 1953. There were three charges, the first being in respect of 100 number lottery, the second in respect of 1,000 number lottery and the third in respect of 10,000 number lottery.